No. 17-961

IN THE
Supreme Court of the United States

THEODORE H. FRANK and
MELISSA ANN HOLYOAK,
Petitioners,

v.

PALOMA GAOS, on behalf of herself and
all others similarly situated, et al.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF AMICUS CURIAE – LAWYERS FOR CIVIL JUSTICE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether, or in what circumstances, a *cy pres* award of class action proceeds that provides no direct relief to class members supports class certification and comports with the requirement that a settlement binding class members must be "fair, reasonable, and adequate?

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STATEMENT OF INTEREST[1]

Lawyers for Civil Justice ("LCJ") is a national coalition of defense trial lawyer organizations, law firms, and corporations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. LCJ's primary purpose is to advocate for fairness and balance in the administration of civil justice, often by proposed changes to the Federal Rules of Civil Procedure ("FRCP") through the Rules Enabling Act process. Since its founding in 1987, LCJ has become a leading voice on FRCP reform. LCJ has submitted written comments related to the Advisory Committee's current work to develop potential amendments to Rule 23 and filed amicus briefs on issues related to the rules and their interpretation.

LCJ has specific expertise on the FRCP and the rulemaking process, drawing on both its own policymaking efforts and the collective experience of its members who are involved in litigation in the federal courts under the FRCP as written. LCJ has a deep knowledge of and interest in the process of civil litigation and how the rules, and a correct interpretation of the rules, can assure a just, inexpensive, and speedy outcome and avoid litigation abuses.

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1 Pursuant to Rule 37.6, *amicus curiae* LCJ certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amicus, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have obtained consent to the filing of this amicus brief pursuant to Rule 37.

The issue of the use of *cy pres* in class actions is one of central concern to LCJ's membership. LCJ's concerns prompted proposed rule changes to abolish *cy pres* in class actions. And, LCJ members have testified at various hearings about the abuses that arise through the use of *cy pres* in the class action context. Accordingly, as amicus curiae, LCJ writes from its unique perspective to urge this Court to hold that a *cy pres* award of class action proceeds that provides no direct relief to class members fails to comport with Rule 23's requirement that a settlement binding class members must be "fair, reasonable, and adequate."

INTRODUCTION

The class action device, while intended to secure a just speedy outcome for certain kinds of claims, has resulted in two significant problems that together are at the heart of the issue before this Court: (1) certification of class actions in which most or all of the plaintiffs do not suffer actual injury; and (2) class actions which result in huge costs to the courts and to the defendants with little or no benefit to absent class members. As in this case, these problems often arise in tandem and each exacerbates the other. That is, when a class is certified even though the class members suffer little or no actual injury, the absent class members cannot be identified and do not make claims on any available settlement fund. Such circumstances all too often lead the parties and courts to resort to *cy pres* as a means of settling the litigation.

As one commentator has explained, "[l]oose certification standards risk high costs by inviting frivolous class action suits that defendants settle rather than face potentially crippling, even bankrupting, damage awards." Robert G. Bone & David S. Evans, Class Certification and the Substantive Merits, 51 Duke L.J. 1251, 1254 (2002). Empirical studies confirm that "almost all class actions settle, and the class obtains substantial settlement leverage from a favorable certification decision. . . . [T]his settlement leverage creates serious problems when deployed in frivolous or weak class action suits." *Id.*, p 1292. See also *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011)

(recognizing that "when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.")

Once such claims settle, courts often "invoke[] the *cy pres* doctrine to distribute unclaimed or non-distributable funds," ostensibly to "serve the policy objectives underlying the class action and the interests of the absent class members 'as nearly as possible.'" Rhonda Wasserman, *Cy Pres* in Class Action Settlements, 88 S. Cal. L. Rev. 97, 116 (2014). In practice, however, the recipients are often "organizations only tangentially related to the subject of the lawsuit." Richard Marcus, *Revolution v. Evolution in Class Action Reform*, 96 N.C. L. Rev. 903, 925 (2018), quoting Adam Liptak, Doling Out Other People's Money, N.Y. Times, Nov. 26, 2007, at A14.

Further, when settlements funds go to "an organization that initiates new litigation," through a *cy pres* distribution, "*cy pres* helps to promote the industry of non-economic litigation. In many instances, *cy pres* distributions go to consumer-interest, litigation-related charities that may then use the distribution to finance new litigation of the same type." Jennifer Johnston, *Cy Pres* Comme Possible to Anything Is Possible: How *Cy Pres* Creates Improper Incentives in Class Action Settlements, 9 J.L. Econ. & Pol'y 277, 296 (2013),

citing *In re Wells Fargo Sec. Litig.*, 991 F. Supp. 1193, 1198 (N.D. Cal. 1998).

The rules require judicial approval of settlements to ensure that the settlement is "fair, reasonable, and adequate." This Court should make clear that a *cy pres* settlement does not satisfy this standard.

SUMMARY OF THE ARGUMENT

In this case, no effort was made to distribute funds to the class members. Instead, as the Court is well aware, the parties agreed to a *cy pres*-only settlement of $8.5 million. In other words, aside from $15,000 in incentive awards to the three named plaintiffs, none of the settlement goes to class members. Class counsel, meanwhile, stand to be enriched by a fee of over $2 million. The remaining funds were allocated to six *cy pres* recipients. In light of such not-uncommon results, the Chief Justice has expressed the need for this Court to address, among other points, "when, if ever," *cy pres* relief in class actions should be considered. *Marek v. Lane*, 134 S. Ct. 8, 9 (2013) (statement of Roberts, C.J., respecting denial of certiorari).

LCJ contends that a proper reading of Rule 23 in conjunction with the Rules Enabling Act, 28 U.S.C. § 2072, makes it clear that a settlement cannot be fair, reasonable, and adequate when class members do not receive any (or at best, a very small portion) of the settlement proceeds. The use of *cy pres* in class action litigation is wholly unrelated to

the doctrine's historical purpose under trust law. In a class action, a *cy pres* distribution of settlement proceeds offers no benefit to the absent class members, and in effect, *cy pres* becomes a punitive device by disbursing funds properly belonging to absent class members to non-litigants.

A categorical rule that *cy pres* settlements can never satisfy Rule 23's requirement that settlements be "fair, reasonable, and adequate" would end these abuses and avoid the need to decide the serious constitutional challenges and problems with legal authority to the use of *cy pres*.

First, allowing distribution of settlement funds to non-parties who have not suffered injury is akin to giving them standing in the action to which they otherwise are not entitled. Relatedly, by effecting such a result, a court steps out of its judicial role in violation of Article III. The court essentially imposes punitive relief on defendants that exceeds the compensation required, if any.

Second, to construe Rule 23 as allowing for so-called *cy pres* relief violates the Rules Enabling Act by imposing a fine on defendants not authorized by the underlying substantive law.

Third, and equally concerning, the failure to compensate actual class members implicates Due Process by eliminating their right to compensatory relief. This problem is exacerbated by conflicts of interests; class counsel are motivated to act in their

own best interest as opposed to the interests of the absent class members.

Fourth, *cy pres* awards infringe on First Amendment rights because such settlements compel class members to subsidize speech. A *cy pres* award essentially requires class members to exchange their cause of action for court-mandated contributions to charities not chosen by them and that may engage in speech or political activity with which the class members may disagree.

Finally, a *cy pres* award of class action proceeds that provides no direct relief to class members does not support class certification. In other words, such an award makes clear that the class was improperly certified in the first place.

By holding that *cy pres* can never be fair, adequate, and reasonable under Rule 23, the Court can avoid constitutional issues and simultaneously ensure that class actions are not used as mechanisms to transfer a defendant's wealth to nonparties and class counsel while depriving class members of compensation for actual injuries.

ARGUMENT

RULE 23'S REQUIREMENT THAT A SETTLEMENT BINDING CLASS MEMBERS MUST BE "FAIR, REASONABLE, AND ADEQUATE" CANNOT BE SATISFIED BY A CY PRES AWARD OF CLASS ACTION PROCEEDS, ESPECIALLY WHEN THERE IS NO DIRECT RELIEF TO CLASS MEMBERS.

A. Rule 23 Requires That Any Settlement Be "Fair, Reasonable, And Adequate."

1. Rule 23 Sets Forth A Standard.

This Court has made clear that "[t]he text of a rule . . . limits judicial inventiveness." *Amchem Prod., Inc. v. Windsor,* 521 U.S. 591, 620 (1997). Under Rule 23(b)(3), a class action may be maintained if the court finds, among other requirements, "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." When the parties to such a suit propose a settlement, "the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate." Rule 23(e)(2). As is evident from the plain language of Rule 23(e), it "contains no categorical rule entitling plaintiffs to *cy pres* distribution—and, in fact, does not mention *cy pres* distribution at all." *All Plaintiffs v. All Defendants*, 645 F.3d 329, 333 (5th Cir. 2011). Instead, the rule provides a standard for lower courts to apply to proposed settlements.

2. The Circuits' Efforts To Apply Rule 23's Standard Are Unsatisfactory.

In interpreting and applying Rule 23's standard, the Circuit Courts of Appeal have applied various multi-factored tests to assess whether a settlement is "fair, reasonable, and adequate." Most of the factors are "intuitively obvious and dependent largely on variables that are hard to quantify." *Nat'l Ass'n of Chain Drug Stores v. New England Carpenters Health Benefits Fund*, 582 F.3d 30, 44 (1st Cir. 2009). See e.g., *In re: Motor Fuel Temperature Sales Practices Litig.*, 872 F.3d 1094, 1116–17 (10th Cir. 2017), cert. denied sub nom.; *Speedway LLC v. Wilson*, 138 S. Ct. 1299 (2018) (setting forth four-factor test); *Pelzer v. Vassalle*, 655 F. App'x 352, 359 (6th Cir. 2016) (applying seven-factor test). And regardless, such multi-factor tests are often recognized as non-exhaustive. See, e.g., *In re Baby Prod. Antitrust Litig.*, 708 F.3d 163, 174 (3d Cir. 2013) (citation omitted) ("additional inquiries . . . in many instances will be useful for a thoroughgoing analysis of a settlement's terms"); *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011) ("The factors in a court's fairness assessment will naturally vary from case to case . . . ."); *In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 195 (5th Cir. 2010) ("Without quarreling with the district court's findings [under the applicable multi-factor test], we nevertheless conclude that this settlement is not fair, reasonable, and adequate under Rule 23(e) because there has been no demonstration on the record below that the settlement will benefit the class in any way . . . .")

Some of the circuits at least pay lip service to concerns that arise in the context of *cy pres* relief, which, as illustrated below, raises questions of basic fairness. For example, the Sixth Circuit has instructed that, "in evaluating the fairness of a settlement . . . we look in part to whether the settlement gives preferential treatment to the named plaintiffs while only perfunctory relief to unnamed class members. Such inequities in treatment make a settlement unfair. The same is true of a settlement that gives preferential treatment to class counsel ...." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 718 (6th Cir. 2013) (citations and punctuation omitted). Similarly, the Seventh Circuit has held that the "inspection of a settlement entails a careful inquiry into the fairness of the settlement to the class members before allowing it to go into effect." *Gen. Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1082 (7th Cir. 1997). And one of the factors the Tenth Circuit considers is "whether the proposed settlement was fairly and honestly negotiated." *In re: Motor Fuel Temperature Sales Practices Litig.*, 872 F.3d at 1116–17 (citation omitted).

Nevertheless, despite the consideration of multiple factors and professed desire to comport with basic fairness, as this case illustrates, courts continue to approve settlements employing *cy pres*, which poses grave concerns regarding standing, judicial authority, and other constitutional issues.

3. Cy Pres Is An Equitable Doctrine Arising Under Trust Law Unrelated, If Not Antithetical, To The Adversary System.

This Court has recognized that the doctrine of *cy pres* – and a court's authority to fashion such a remedy – originates under the law of charities and trusts:

> where property has been devoted to a public or charitable use, which cannot be carried out on account of some illegality in or failure of the object, it does not, according to the general law of charities, revert to the donor or his heirs, or other representatives, but is applied under the direction of the courts, or of the supreme power in the state, to other charitable objects, lawful in their character, but corresponding, as near as may be, to the original intention of the donor. . . . [T]he authority thus exercised arises in part from the ordinary power of the court of chancery over trusts, and in part from the right of the government or sovereign, as parens patriae, to supervise the acts of public and charitable institutions . . . .

Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 56 (1890). See also Restatement (Third) of Trusts § 67, Failure of Designated Charitable Purpose: The Doctrine of

Cy Pres (2003) ("[W]here property is placed in trust to be applied to a designated charitable purpose and it is or becomes unlawful, impossible, or impracticable to carry out that purpose . . . the charitable trust will not fail but the court will direct application of the property or appropriate portion thereof to a charitable purpose that reasonably approximates the designated purpose.") In other words, when a donor voluntarily gives property for a charitable or trust purpose, and the purpose can no longer be carried out as precisely specified, the courts are empowered to cause the funds to be used as their donor would likely have intended had he or she known the present circumstances.

Judge Richard Posner has aptly observed that the use of *cy pres* in the context of class actions is unrelated to the doctrine's historical purpose under trust law. In a class action, *cy pres* offers no benefit to the absent class members, and in effect, becomes a punitive device:

> The doctrine [of *cy pres*], or rather something parading under its name, has been applied in class action cases, but for a reason unrelated to the reason for the trust doctrine. That doctrine is based on the idea that the settlor would have preferred a modest alteration in the terms of the trust to having the corpus revert to his residuary legatees. So there is an indirect benefit to the settlor. In the class action context the reason for appealing to *cy pres* is to

> prevent the defendant from walking away from the litigation scot-free because of the infeasibility of distributing the proceeds of the settlement (or the judgment, in the rare case in which a class action goes to trial) to the class members. There is no indirect benefit to the class from the defendant's giving the money to someone else. In such a case the "*cy pres*" remedy . . . is purely punitive.

Mirfasihi v. Fleet Mortg. Corp., 356 F.3d 781, 784 (7th Cir. 2004).

The justification for use of *cy pres* in class action settlements is to put "the defendant's funds to valuable and worthwhile use, rather than necessarily compensating the absent class members." Martin H. Redish et. al., *Cy Pres* Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis, 62 Fla. L. Rev. 617, 635–36 (2010). But "[i]t is inherently dubious to apply a doctrine associated with the voluntary distribution of a gift to the entirely unrelated context of a class action settlement . . . ." *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 480 (5th Cir. 2011) (Jones, J., concurring). In a class action, no funds have been donated. Instead, a court must exercise its judicial power to approve a settlement taking funds from the defendant and giving them to a non-party to the litigation. In so doing, the use of *cy pres* in class actions raises a host of constitutional and fairness concerns. These issues arise most often when

plaintiffs have little or no actual injury, leading parties and courts to the inappropriate use of *cy pres* to mask the underlying problems with the litigation as a whole.

B. A Rule That A *Cy Pres* Settlement Award Cannot Be Fair, Reasonable, And Adequate Under Rule 23 Would Permit The Court To Interpret Rule 23 Within The Limits Of The Rules Enabling Act Authority And Also Avoid The Serious Constitutional Issues Raised By The Parties And Amici.

Rule 23's requirement that a settlement be "fair, reasonable, and adequate" should not permit a *cy pres* distribution because *cy pres* gives standing to those not injured, imposes unauthorized punitive damages on defendants, and infringes the Due Process and First Amendment rights of actual class members. This Court should adhere to "the constitutional-avoidance canon," which instructs that "when statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems." *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018).

1. Cy Pres Is An Improper Use Of Judicial Power Under Article III.

Chief among the perils posed by a *cy pres* award of class action proceeds is the flouting of Article III's case or controversy requirement and the

separation of powers doctrine. "Article III of the Constitution limits the 'judicial power' of the United States to the resolution of 'cases' and 'controversies.'" *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982). The case or controversy requirement is intertwined with standing because "at an irreducible minimum, Article III requires the party who invokes the court's authority to show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, and that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision." *Id.* at 472 (citations and quotation marks omitted).

Additionally, Article III is intended to "limit the federal judicial power to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process." *Id.* (citation and quotation marks omitted). Requiring a party to demonstrate an "actual injury redressable by the court . . . . tends to assure that the legal questions presented to the court will be resolved . . . in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Id.*

A recent decision from this Court arising in the class action context emphasizes that to establish an actual injury "a plaintiff must show that he or she suffered an invasion of a legally protected interest

that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016), as revised (May 24, 2016) (internal quotations and punctuation omitted). "For an injury to be 'particularized,' it must affect the plaintiff in a personal and individual way. . . . An injury in fact must also be 'concrete.' . . . A 'concrete' injury must be 'de facto'; that is, it must actually exist." *Id.* (internal citations and punctuation omitted).

As one commentator has explained, implementing a *cy pres* remedy in a class action context indisputably results in an award of "'damages' to an uninjured third party." Redish et. al., 62 Fla. L. Rev. at 642. Accordingly, "[c]ourts should be troubled that a *cy pres* distribution to an outsider uninvolved in the original litigation may confer standing to intervene in the subsequent proceedings should the distribution somehow go awry." *Klier*, 658 F.3d at 481 (Jones, J., concurring).

Moreover, the award of damages to the uninjured third party through use of a *cy pres* distribution "is purely punitive." *Mirfasihi*, 356 F.3d at 784. Thus, the court's function is "effectively transform[ed] . . . into a fundamentally executive role, because no longer is the court functioning as a judicial vehicle by which legal injuries suffered by those bringing suit are remedied. Instead, the court presides over the administrative redistribution of wealth for social good." Redish et. al., 62 Fla. L. Rev. at 641-42. "As a result, the practice violates both the

constitutional separation of powers and the case-or-controversy requirement of Article III." *Id.* at 642.

Indeed, the class respondents effectively advocate for courts to transform themselves into extra-constitutional grant-writing entities. The response to the petition detailed how potential *cy pres* recipients were "required to and did submit a detailed grant-like proposal detailing exactly how the money would be put to use." Brief for the Class Respondents in Opposition, pp 5-6. Respondent Google for its part deems it a "positive development" that parties and courts are "using 'a grant-like approach' to thoroughly vet potential *cy pres* recipients." Brief in Opposition of Respondent Google, p 22, n. 5.

In the absence of statutory authorization, courts have no power to redistribute money between a defendant and an uninjured private entity – even if they make those private entities submit detailed "grant-like" proposals. Moreover, the judiciary's competency as a free-floating grant-providing agency is questionable. Unlike typical granting agencies, with staff to review detailed proposals, check the backgrounds of grant-seeking groups, and follow up with a review of how the funds were actually spent, the federal courts are created to decide cases and controversies, using the judicial power. Each time the courts approve a settlement with a *cy pres* award, the courts are obligated to either approve it without adequate information or to step outside of their judicial role and function to become a grant-

conferring entity, essentially operating as an executive entity.

2. Cy Pres Violates The Rules Enabling Act By Imposing A Fine On Defendants Not Authorized By The Underlying Substantive Law.

In addition to being an improper use of judicial power, construing Rule 23 to allow *cy pres* distributions also violates the Rules Enabling Act.

The Court has previously instructed that, "Rule 23's requirements must be interpreted in keeping . . . with the Rules Enabling Act . . . ." *Amchem*, 521 U.S. at 613. The Rules Enabling Act provides in relevant part:

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right. . . .

28 U.S.C. § 2072.

A rule of procedure must "really regulate[] procedure," which is "the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress

for disregard or infraction of them." *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941). If a rule "governs only the manner and the means by which the litigants' rights are enforced, it is valid; if it alters the rules of decision by which the court will adjudicate those rights, it is not." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407 (2010) (citations and punctuation omitted).

When addressing Rule 23 generally, this Court has observed that, "rules allowing multiple claims (and claims by or against multiple parties) to be litigated together are . . . valid," because "[s]uch rules neither change plaintiffs' separate entitlements to relief nor abridge defendants' rights; they alter only how the claims are processed. For the same reason, Rule 23—at least insofar as it allows willing plaintiffs to join their separate claims against the same defendants in a class action—falls within § 2072(b)'s authorization. . . . [L]ike traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Id.* at 408 (opinion of Scalia, J.).

Although Respondents speak in innocuous terms depicting a benevolent grant writing institution, *cy pres* distributions are troublesome because they "arguably violate the Rules Enabling Act by using a wholly procedural device—the class-action mechanism as prescribed in Rule 23—to transform substantive law from a compensatory remedial structure to the equivalent of a civil fine." *Klier*, 658 F.3d at 481 (Jones, J., concurring) (citation and punctuation omitted). For example the

substantive law at issue here, the Stored Communications Act, 18 U.S.C. § 2701 *et seq.* and the common law of contracts, does not require defendants to pay third parties that they have not injured. Accordingly, "[i]f existing substantive remedies are deemed inadequate . . . the task of altering the remedial framework is one for the authority that created the substantive law in the first place. Resort to *cy pres* when existing remedies cannot effectively be invoked by use of the class action device, then, improperly distorts the remedial structure through use of a nakedly procedural device." Redish et. al., 62 Fla. L. Rev. at 640.

3. Cy Pres Implicates Due Process.

While the use of *cy pres* in effect confers standing on those who could not otherwise show injury, a *cy pres* distribution of class action settlements also affects the Due Process rights of absent class members. Concern is warranted here because as Professor Redish explains, in this context, "use of *cy pres* . . . threatens the absent individual claimants' right to due process by judicially revoking their substantive right to compensatory relief." Redish et. al., 62 Fla. L. Rev. at 645.

Relatedly, a *cy pres* award of class action proceeds creates inherent conflicts of interest because class counsel is motivated to act in their own best interest as opposed to the interests of the absent class members. More specifically, where identification of absent class members and calculation of their damages is possible, but time-

consuming and costly, class counsel may be tempted to avoid the expense of proving causation and damages by asserting that such proof is too difficult or making it challenging for class members to claim their share of the settlement. See *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014) ("From the selfish standpoint of class counsel and the defendant, therefore, the optimal settlement is one modest in overall amount but heavily tilted toward attorneys' fees."); *In re Baby Prod. Antitrust Litig.*, 708 F.3d 163, 173 (3d Cir. 2013) ("[I]nclusion of a *cy pres* distribution may increase a settlement fund, and with it attorneys' fees, without increasing the direct benefit to the class."); *Mirfasihi*, 356 F.3d at 785 (holding a *cy pres* settlement to avoid litigation expense and gain a large class counsel fee "sold [the class] claimants down the river").

4. Cy Pres Infringes On Class Members' First Amendment Rights.

"[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Accordingly, "the government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves." *Harris v. Quinn*, 134 S. Ct. 2618, 2639 (2014) (citation and punctuation omitted). As is relevant here, this Court has recognized that the "compelled funding of the speech of other private speakers or groups presents the same dangers as compelled speech." *Id.* (citation and punctuation

omitted). See also *United States v. United Foods, Inc.*, 533 U.S. 405, 411 (2001) ("First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors . . . ."); *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, No. 16-1466, 2018 WL 3129785 (U.S. June 27, 2018) (state law which forces public employees "to subsidize a union, even if they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities," is a violation of "the free speech rights of nonmembers" because it compels them "to subsidize private speech on matters of substantial public concern.")

A *cy pres* settlement essentially requires class members to exchange their cause of action for court-mandated contributions to charities or advocacy organizations not chosen by them and that may engage in speech or political activity which class members do not support. It is impractical if not completely unworkable to find a single entity on which all class members could agree. The concern is especially pronounced in this case because, as explained in the petition, the funds were distributed to some entities to which defendant Google had previously given financial support.

C. A *Cy Pres* Award Of Class Action Proceeds That Provides No Direct Relief To Class Members Does Not Support Class Certification.

A necessary conclusion of the above discussion is that a *cy pres* award of class action proceeds that provides no direct relief to class members does not support class certification. This Court itself has recognized that an action under Rule 23(b)(3) is one in which "class action treatment is not as clearly called for." *Amchem*, 521 U.S. at 615. By resorting to *cy pres*, the courts and parties are admitting that they cannot compensate class members who were actually injured.

Respondents appear to go a step further in arguing that, in this case, class members ***should not*** be compensated because they suffered no injury. Specifically, Google contends that *cy pres* is proper because the class members suffered no harm and could not otherwise meet the requirements articulated in *Spokeo*: "This case is unusually well-suited to a *cy pres* remedy because no class member appears to have been actually harmed by the challenged practices . . . ." Brief in Opposition by Respondent Google, pp 2-3. Therefore, in Google's view, "any direct payment [to class members], however modest, [is] a windfall rather than compensation." *Id.*, p 15. Noting that "*Spokeo* clarifies that Article III requires lower federal courts to weed out putative class actions seeking statutory damages in the absence of actual harm," Google proves the point by further explaining, "[t]hese are

the cases that are most likely to result in proposed *cy pres* only settlements if they make it past the pleadings stage. . . ." *Id.*, p 22. In other words, "[c]lass members were unharmed and unlikely to receive anything from further litigation." *Id.*, p 23. In its effort to uphold the settlement terms by arguing that this case is sui generis, Google reveals the fundamental problem with the use of *cy pres* as part of a settlement.

A *cy pres* settlement occurs when class members who were actually injured cannot be compensated, or because class members are admittedly uninjured and thus undeserving of compensation. In either instance, the use of *cy pres* indicates that class certification is unsupported and that the proposed settlement is not "fair, reasonable, and adequate" since it is either circumventing the standing requirements of Article III or depriving actually injured but absent class members of their cause of action without providing them any relief.

CONCLUSION

In sum, courts "must not apply a federal rule of civil procedure if application of the rule violates either the Constitution or the Rules Enabling Act." *Douglas v. NCNB Texas Nat. Bank*, 979 F.2d 1128, 1130 (5th Cir. 1992), citing *Hanna v. Plumer*, 380 U.S. 460, 470-73 (1965); *Weems v. McCloud*, 619 F.2d 1081, 1097–98 n. 38 (5th Cir.1980). But reading Rule 23 to allow *cy pres* settlements does just that.

Allowing distribution of settlement funds to non-parties who have not suffered injury confers standing in an action, which would not have otherwise been granted. Moreover, when a court grants standing to an uninjured party, the court exceeds its authority under Article III and violates the Rules Enabling Act by imposing punitive relief not authorized by the underlying substantive law. The failure to compensate actual class members implicates Due Process by eliminating their right to compensatory relief, and at the same time, infringes their First Amendment rights by compelling the class members to support the speech of the *cy pres* recipients with whom they may disagree.

Finally, a *cy pres* settlement is used because class members who were actually injured cannot be compensated, or because class members are admittedly uninjured and thus undeserving of compensation. In either instance, the use of *cy pres* establishes that class certification is unsupported.

By holding that *cy pres* can never be fair, adequate, and reasonable under Rule 23, the Court can avoid the identified constitutional and other issues while ensuring that the substantive rights of both class members and defendants are protected.

Accordingly, *Amicus Curiae* LCJ respectfully requests this Court reverse the decision of the court of appeals.

Respectfully submitted,

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